BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD F. MEYER Claimant	)	
VS.	)	
BOMBARDIER/LEARJET Respondent	)	Docket No. 1,015,257
AND	)	
ACE AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 23, 2010, Award of Review and Modification entered by Administrative Law Judge John D. Clark. The Board heard oral argument on June 18, 2010. Phillip R. Fields, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a significant increase in impairment to his right and left shoulders and was entitled to an award under the review and modification statute. The ALJ found that claimant is now permanently and totally disabled.

The Board has considered the record and adopted the stipulations listed in the original Award of December 18, 2006, and in the Award of Review & Modification entered March 23, 2010.

ISSUES

Respondent argues that claimant's Application for Review and Modification is time-barred because it was filed more than 225 weeks after claimant's date of accident. Respondent contends that even factoring in the six-month look back period, claimant was out of time for filing an application for review and modification. Respondent further argues

that claimant is not entitled to a permanent total disability because he did not suffer amputation of his arms at the shoulder joint and because he retains the use of his arms. Respondent also contends that claimant is capable of engaging in substantial and gainful employment. Also, respondent argues that claimant has no increase in his functional impairment. In the alternative, if the Board finds that claimant can recover more weeks of permanent partial disability benefits, respondent asserts the Board should adopt the opinions of Dr. Chris Fevurly and award claimant an additional 5 percent functional impairment to the right upper extremity at the level of the shoulder, which would result in 9.59 weeks of permanent partial disability benefits, and an additional 6 percent functional impairment to the left extremity at the level of the shoulder for 12.29 weeks of permanent partial disability benefits.

Claimant contends his application for review and modification was timely and that he is entitled to an award for permanent total disability benefits. Claimant, however, asks that the Award of Review & Modification be modified to find that the remaining benefits due after March 23, 2010, would be $67,423.04 rather than the amount set out in the award.

The issues for the Board's review are:

(1) Is claimant's Application for Review & Modification barred because it was filed more than 225 weeks after the date of accident which resulted in claimant's scheduled injuries to his bilateral shoulders?

(2) What is the nature and extent of claimant's disability? Do claimant's bilateral upper extremity injuries create a presumption of permanent total disability? If so, has that presumption been rebutted? If so, has claimant's percentage of functional impairment increased?

(3) What is the correct calculation of the permanent partial disability award upon review and modification?

FINDINGS OF FACT

Claimant originally suffered injury to his right shoulder in December 2000 while working for respondent. He was treated by Dr. Harry Morris and underwent surgery to repair a rotator cuff tear on July 31, 2001. Dr. Morris released him from treatment on November 21, 2001, with no restrictions. Dr. Morris rated claimant as having a 5 percent permanent partial impairment to his right upper extremity. Dr. Pedro Murati examined claimant at the request of claimant's attorney. He rated claimant as having a 17 percent permanent partial impairment to his right upper extremity. This claim was settled on April 4, 2002, based upon an 11 percent impairment to the right shoulder.[1]

[1] *Meyer v. Bombardier, Inc.*, No. 1,002,744.

Claimant returned to Dr. Morris on January 8, 2003, complaining of numbness in his right hand, pain from his neck to his right elbow, and pain in his right shoulder. An arthrogram found an incomplete tear in the right shoulder, and a second surgery was performed on April 15, 2003. On September 10, 2003, claimant was released from treatment with restrictions of no lifting above 30 pounds, and the lifting was to be done close to the body. Dr. Morris found no increase in claimant's impairment. Claimant filed an Application for Hearing on February 10, 2004, claiming injuries to his bilateral shoulders from a "series [of accidents] through 1/19/04 and each workday thereafter."[2]

In February 2004, claimant returned to Dr. Morris, this time complaining of pain in both shoulders. Another arthrogram done on claimant's right shoulder found a full-thickness rotator cuff tear. A third rotator cuff repair was performed on May 18, 2004. An MRI of claimant's left shoulder found he also had a rotator cuff tear on his left, but because his right shoulder was not healed, it was decided not to do anything on his left at that time. Claimant was released from care of his right shoulder on May 11, 2005. His permanent restrictions of no lifting more than 30 pounds and keeping the lifting close to his body did not change. In accordance with the AMA *Guides*,[3] Dr. Morris rated claimant as having a 15 percent permanent partial impairment to his right shoulder and a 9 percent permanent partial impairment to his left shoulder, which converted to an 11 percent whole person impairment. Dr. Morris also believed that claimant had a 10 percent task loss.

Claimant returned to Dr. Morris on January 25, 2006, complaining of a cold sensation coming down his right shoulder. He also told Dr. Morris that weather changes bothered his left shoulder. Dr. Morris did not offer treatment and did not change claimant's restrictions.

Claimant was examined by Dr. Pedro Murati, a board certified independent medical examiner, on April 24, 2006, at the request of his attorney. Based on the AMA *Guides*, Dr. Murati assigned claimant a 15 percent impairment to the right shoulder and a 12 percent impairment to the left shoulder, which converted to a 15 percent whole body impairment, which he attributed solely to this accident. He also opined that claimant had a 42 percent task loss. He recommended that claimant not climb ladders, crawl, do any heavy grasping, or work above chest level. He said claimant should not lift, carry, push or pull more than 20 pounds occasionally or 10 pounds frequently.

Dr. Chris Fevurly is board certified in internal medicine and preventative medicine with specialization in occupational medicine. He examined claimant on September 1, 2006, at the request of respondent. He opined that claimant had an 11 percent permanent partial impairment to his right upper extremity, but believed that impairment was

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[2] Form K-WC E-1, Application for Hearing filed February 10, 2004.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

attributable to claimant's earlier injury of December 2000. Dr. Fevurly believed that claimant may have some permanent impairment to his left shoulder that was not related to his work activities. Dr. Fevurly recommended that claimant limit lifting to 50 pounds occasionally and 40 pounds frequently. He also found that claimant had a 15 percent task loss.

Claimant was laid off by respondent, after which he began working for a temporary staffing agency, Oasis Staffing (Oasis) in June 2006. The entire time he worked for Oasis, he worked at Norland Plastics. He applied for Social Security disability while working for Oasis/Norland Plastics. Factors in his request for disability were obesity, seizure disorder, hypertension and his shoulder condition. He has not worked anywhere since he quit his job at Oasis/Norland Plastics in September 2006, a couple of weeks before the regular hearing. He was granted Social Security disability benefits in January 2008.

In the Award entered December 18, 2006, the ALJ found that claimant had a 13 percent permanent partial impairment to the body as a whole and that he was entitled to a work disability. The ALJ calculated claimant's work disability to be 52.5 percent based on an imputed wage and an average of the task loss opinions of Drs. Morris and Murati. The claimant filed an Application for Review of the Award, claiming the calculation of the Award was incorrect. The Board entered an Order on May 30, 2007, finding that pursuant to *Casco*,[4] claimant's injuries had to be calculated as two separate scheduled injuries rather than an injury to the body as a whole. The Board found that the record did not show that claimant was permanently totally disabled but that claimant, instead, had a 10 percent loss of use of the right shoulder and a 9 percent loss of use of the left shoulder.[5]

Claimant continued to have problems after the entry of the Board's Order. On October 1, 2007, he saw Dr. Morris for an evaluation of his shoulders. Dr. Morris said claimant's complaints were of problems with his left shoulder.

On July 1, 2008, Dr. Morris certified that claimant qualified for homestead benefits because of a disability preventing him from engaging in substantial gainful activity by reason of a medically determinable physical impairment that has lasted the entire year of 2007. On the Kansas Certificate of Disability form, Dr. Morris indicated that claimant had a 30 pound lifting restriction and a restriction to lift close to the body, both permanent restrictions, for rotator cuff tears in both shoulders.

Claimant returned to see Dr. Morris on November 3, 2008. He was having more pain in his left shoulder. Dr. Morris found he had marked limitation of motion of his left

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[4] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007). The ruling in *Casco* came down from the Kansas Supreme Court on March 23, 2007, after claimant's Application for Review of the Award was filed but before the Board's Order was entered.

[5] *Meyer v. Bombardier/Learjet*, No. 1,015,257, 2007 WL 2043592 (Kan. WCAB May 30, 2007).

shoulder, as well as weakness. Although claimant wanted to continue conservative treatment, he had no improvement; and on April 21, 2009, Dr. Morris performed rotator cuff repair surgery on his left shoulder. Dr. Morris believes that the surgery performed on claimant's left shoulder improved his shoulder function. Also, on his last visit with claimant, July 27, 2009, Dr. Morris found that claimant's right shoulder range of motion was better than it had been previously, although he said claimant's shoulders' range of motion varied throughout the years of his treatment.

Dr. Morris' medical note of July 27, 2009, indicates that claimant's lifting restriction was lowered from 30 pounds to 20 pounds. However, in his deposition Dr. Morris testified that his physicians assistant wrote 20 pounds in the note but Dr. Morris meant for claimant's restriction to remain at 30 pounds. Dr. Morris said that claimant is capable of gainful employment as long as he stays within his permanent restrictions.

Dr. Morris does not believe claimant's shoulders have deteriorated from 2005 to 2009. Rather, he believes claimant's left shoulder has improved with surgery. Dr. Morris rated claimant as having a 9 percent permanent partial impairment to his upper left extremity at the level of the shoulder, the same rating he gave in 2005. He did not add any percentage of impairment for the surgery on claimant's left shoulder. Dr. Morris testified that he used the AMA *Guides* as a guide but that the rating he gave is his opinion based on his experience.

Dr. Murati examined claimant again on August 27, 2009, for the purpose of re-evaluating his shoulders. Claimant's chief complaints were pain in the shoulders, numbness and tingling in his hands, and cold making the left shoulder pain worse. Claimant had undergone rotator cuff repair and left arthroscopic subacromial decompression surgery. After examining claimant, Dr. Murati diagnosed him with status post left arthroscopic subacromial decompression surgery and left rotator cuff repair, status post right shoulder surgery times three, and bilateral carpal tunnel syndrome not at maximum medical improvement.

In August 2009, Dr. Murati rated claimant as having a 33 percent permanent partial impairment to his right upper extremity and a 26 percent permanent partial impairment to his left upper extremity, both at the level of the shoulder, based on the AMA *Guides*. Dr. Murati recommended that claimant have a restriction that he rest every 15 to 30 minutes. He also gave him restrictions of no climbing ladders, crawling, above shoulder level work or heavy grasping. He said claimant should not be permitted to work more than 18 inches away from his body and should use wrist splints while working. He could occasionally perform repetitive grasping/grabbing and frequently perform repetitive hand controls. Claimant should not use hooks, knives or vibratory tools. If using a keyboard, claimant should have 10 minutes on and 50 minutes off. Claimant should not lift, carry,

push or pull more than 10 pounds occasionally or 5 pounds frequently.[6] Dr. Murati opined that claimant is essentially unemployable.

Dr. Chris Fevurly evaluated claimant a second time on November 13, 2009, again at the request of respondent. Since Dr. Fevurly had last seen claimant, Dr. Morris had performed surgery on claimant's left shoulder. After examining claimant a second time, Dr. Fevurly diagnosed him with bilateral shoulder rotator cuff tendinopathy/tears with impingement and advanced degenerative joint disease in the glenohumeral joint.

Dr. Fevurly believed that claimant's rotator cuff tears were degenerative in nature and not traumatic and had no clinical connection to his work. Nevertheless, he noted he was aware the ALJ decided the rotator cuff tears were work related. After reviewing claimant's medical history since his last evaluation and using the AMA *Guides*, Dr. Fevurly rated claimant as having a 15 percent right upper extremity impairment and a 15 percent left upper extremity impairment. Dr Fevurly suggested that claimant limit lifting to 20 pounds at chest level.[7] Dr. Fevurly said claimant should not perform forceful pushing or pulling above chest level with either arm. He believes claimant is capable of substantial and gainful employment.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on November 20, 2009, at the request of respondent. Dr. Stein said that Dr. Murati's 10 percent impairment rating for subacromial decompression was incorrect because a patient with a subacromial decompression procedure should be given an impairment for loss of range of motion. Dr. Stein also questioned Dr. Murati's rating for impairment for shoulder joint crepitus in addition to impairment for range of motion. He said that the *Guides* state a physician is not to rate crepitus and range of motion but is to decide which is more appropriate.

Dr. Stein performed range of motion testing on claimant. He said claimant manifested a substantially restricted range of motion of the shoulder. He said the range of motion claimant exhibited was inconsistent with the range of motion shown in Dr. Morris' records. Dr. Stein rated claimant's impairment for loss of range of motion of the left shoulder to be 18 percent. By subtracting claimant's preexisting impairment of 9 percent to the left shoulder, he calculated claimant's new impairment to the left shoulder to be 10 percent.

Dr. Stein rated claimant's impairment for loss of range of motion of the right shoulder to be 21 percent, which he combined with a 10 percent rating for distal clavicle resection to compute to a 28 percent right upper extremity impairment at the level of the shoulder. When subtracting the preexisting 10 percent that was awarded to claimant by

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[6] Dr. Murati had previously restricted claimant from climbing ladders, crawling, working above chest level and working more than 18 inches from the body. Claimant was restricted from lifting more than 20 pounds occasionally and 10 pounds frequently.

[7] Dr. Fevurly's previous lifting restriction was 50 pounds occasionally, 40 pounds frequently.

the Board in its May 30, 2007, Order[8], Dr. Stein calculated claimant's new impairment to the right shoulder to be 15 percent.

Dr. Stein gave claimant the following restrictions: no lifting more than 20 pounds with either hand above chest level, no lifting or activity with either hand more than 18 inches from the body, and no activity with either hand behind the body or above shoulder level. Dr. Stein said that claimant is capable of working within those permanent restrictions.

Dan Zumalt, a vocational rehabilitation consultant, met with claimant on December 8, 2009.[9] Mr. Zumalt believed that claimant is capable of substantial, gainful employment working within his current restrictions. He opined that claimant could perform the job of a shipping and receiving weigher.

PRINCIPLES OF LAW AND ANALYSIS

Is claimant's Application for Review & Modification barred because it was filed more than 225 weeks after the date of accident which resulted in claimant's scheduled injuries to his bilateral shoulders?

This claim involved a series of accidents with an ending date of April 13, 2004. Claimant's injuries were to his shoulders and, therefore, his permanent partial disability compensations were calculated under K.S.A. 44-510d(a)(13) at the 225 week level. The 225 week period after the accident date expired August 5, 2008. Claimant filed his Application for Review and Modification on March 10, 2009. Respondent argues that even employing the six-month look back period provided for in K.S.A. 44-528(d), the earliest possible date for claimant to receive additional compensation under an award for review and modification is September 10, 2008. As September 10, 2008, is beyond 225 weeks from the date of accident, respondent contends that claimant's application for review and modification is untimely.

Citing *Redgate,*[10] claimant responds that K.S.A. 44-528 is not a statute of limitations and contains no time limit for applying for modification of the original award. Respondent cites *Ponder-Coppage*[11] for its holding that K.S.A. 44-528(d) is limited by the 415 week benefit limitation in K.S.A. 44-510e:

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[8] See Stein Depo. (Jan. 18, 2010) at 14; *Meyer v. Bombardier/Learjet*, No. 1,015,257, 2007 WL 2043592 (Kan. WCAB May 30, 2007).

[9] Mr. Zumalt had met with claimant previously on September 27, 2006, during which he prepared a task list for the jobs claimant worked in the 15-year period before his accident. Mr. Zumalt also testified concerning jobs claimant could perform and his opinion concerning claimant's wage loss.

[10] *Redgate v. City of Wichita*, 17 Kan. App. 2d 253, 263, 836 P.2d 1205 (1992).

[11] *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

> K.S.A. 44-510e(a) sets forth the number of weeks that compensation is received but limits that compensation to 415 weeks from the date of the work-related accident. Consequently, even if the effective date of a modified award is 6 months before the application was filed, the modified award only compensates for the remaining unpaid weeks, if any, that are proven but not yet expired. If an employer has paid the maximum amount, the modified award does not offer further payment.[12]

But K.S.A. 44-510e(a)(3) contains language that is different from the scheduled injury statute, K.S.A. 44-510d.

> In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.[13]

K.S.A. 44-510d contains no such time limitation. Instead, permanent partial disability compensation is limited only by number of weeks:

> If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . . .
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> (13) . . . for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structure, 225 weeks.[14]

Because of the different statutory language, the Board holds that unlike compensation for general body disabilities under K.S.A. 44-510e, where review and modification is limited to a 415-week time period, review and modification of scheduled injuries is limited by the number of weeks of disability payments, not calendar weeks from the date of accident.

Respondent also cites the unpublished Court of Appeals decision in *Stinchcomb.*[15] However, that case also dealt with review and modification of a general body disability award under K.S.A. 44-510e, not a scheduled injury under K.S.A. 44-510d. Furthermore, *Stinchcomb* applied an earlier version of K.S.A. 44-510e that pre-dated the 1993 amendments to that statute, and the claimant had actually been paid the full 415 weeks

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[12] *Id.* at 200.

[13] K.S.A. 44-510e(a)(3).

[14] K.S.A. 44-510d(a).

[15] *Stinchcomb v. Raytheon Aircraft Co.*, 111 P.3d 663, 2005 WL 1214246 (Kan. App. May 20, 2005).

of permanent partial disability compensation before filing her application for review and modification of her award. As such, the *Stinchcomb* decision is not relevant to the issue before us in this case.

In conclusion, although claimant's application for review and modification of the May 3, 2007, Award was filed more than 225 weeks after the date of accident, it is not time barred. Therefore, we will turn now to the nature and extent of claimant's disability.

What is the nature and extent of claimant's disability?

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.[16]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[17] If there is a change in either the claimant's impairment or work disability, then the award is subject to review and modification.[18]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[19] Our appellate courts have consistently held

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[16] K.S.A. 44-528(a).

[17] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[18] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[19] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[20]

Because claimant has sustained injury to both upper extremities, *Casco*[21] governs the analysis for calculating claimant's compensation and creates a presumption that claimant has sustained a permanent total disability. The court in *Casco* stated:

> The analysis begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. *Pruter* [*v. Larned State Hospital*], 271 Kan. [Kan. 865, 875-76, 26 P.3d 666 (2001)].
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> If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability. See K.S.A. 44-510c(a)(2); *Pruter*, 271 Kan. at 875-76. Although both K.S.A. 44-510d and K.S.A. 44-510e apply to permanent partial disability, we note that eyes, hands, arms, feet, and legs are all included in the schedule. See K.S.A. 44-510d(a)(11)-(17). Because the legislature has made the schedule of injuries the general rule and permanent partial general disability the exception to the rule, the claimant's compensation must be calculated in accordance with the *[sic]* K.S.A. 44-510d for scheduled injuries. See, *e.g.*, *Pruter*, 271 Kan. at 876.[22]

Respondent argues that claimant's bilateral upper extremity injuries do not give rise to a presumption of permanent total disability because K.S.A. 44-510c requires an amputation or a total loss of use of the parallel scheduled members whereas here claimant suffered only a partial loss of use of his shoulders. Respondent's argument is based upon a plausible interpretation of the statutes, but the Board need look only to the facts in *Casco*[23] for its answer. Like the claimant in this case, the claimant in *Casco* suffered only permanent partial impairments to his upper extremities, not amputations or 100 percent loss of use of his shoulders. Mr. Casco was found to have sustained a 27 percent impairment and permanent partial disability to his right shoulder and a 6 percent impairment and permanent partial disability to his left shoulder.[24] Nevertheless, the Kansas

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[20] See, *e.g.*, *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

[21] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[22] *Id.* at 527-28.

[23] *Casco*, 283 Kan. 508.

[24] *Id.* at 513.

Supreme Court found that Mr. Casco's injuries gave rise to a presumption of permanent total disability.

> When a single injury causes the claimant to suffer the loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof, we apply the *Pruter*[25] analytical model. Our analysis begins with determining whether Casco is permanently and totally disabled. See *Pruter*, 271 Kan. at 875. Because Casco suffers from the loss of both arms, K.S.A. 44-510c(a)(2) establishes a rebuttable presumption that he is permanently, totally disabled. If that presumption is not rebutted by evidence in the record, Casco's compensation must be calculated in accordance with K.S.A. 44-510c as a permanent total disability.[26]

Respondent contends that *Casco* is not controlling because the Supreme Court was not presented with the precise distinction argued here; *i.e.*, whether K.S.A. 44-510c requires an amputation or a total loss of use as opposed to a partial loss of use of parallel scheduled members. Respondent's argument is for the Supreme Court. The Board finds that *Casco* is controlling of the issue. Claimant's injuries create a presumption that he is permanently and totally disabled. The question now becomes whether respondent has met its burden to rebut that presumption.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[27], held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

Only Dr. Murati opined that claimant was essentially unemployable. Both Drs. Fevurly and Stein testified that claimant was capable of engaging in substantial gainful employment. And Dr. Morris, despite his having approved a Kansas Department of Revenue form to the contrary, testified that claimant was capable of working within his restrictions. The work restrictions given by Dr. Morris are not that onerous: limit lifting to 30 pounds, with the lifting to be done close to the body. Respondent's vocational expert, Mr. Zumalt, testified that there were jobs claimant could perform within those restrictions. In addition, claimant did perform work for wages after his injuries. Thereafter, he also

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[25] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[26] *Casco*, 283 Kan. at 528-29.

[27] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

underwent surgery for his left shoulder and received improvement from that surgery. The Board concludes that the presumption of permanent total disability has been rebutted.

Turning now to the question of whether claimant's percentage of functional impairment has increased, the Board finds that it has. Dr. Murati originally rated claimant's impairments at 15 percent to the right upper extremity and 12 percent to the left upper extremity. He now rates claimant's impairments at 33 percent to the right upper extremity, an increase of 18 percent, and 26 percent to the left upper extremity, a 14 percent increase. Dr. Fevurly originally rated claimant as having an 11 percent impairment on this right. He did not rate claimant's left upper extremity. He now rates claimant's impairment as 15 percent to the right upper extremity and 15 percent to the left upper extremity. This calculates to an increase in impairment to claimant's right upper extremity of 4 percent and to claimant's left upper extremity of 15 percent. Dr. Morris originally found that claimant had a 15 percent impairment to his right upper extremity and a 9 percent to his left upper extremity, and he opined that claimant's impairment has remained the same, giving claimant a 0 percent increase in impairment for both upper extremities. Dr. Stein examined claimant one time, that being relative to claimant's application for review and modification. Dr. Stein concluded that claimant has a 15 percent increase in impairment in his right upper extremity and a 10 percent increase in impairment in his left upper extremity.

The Board finds that the opinions of all four doctors are credible and claimant's increase in impairment will be computed using an average of their conclusions. For claimant's right upper extremity, the average of the doctors' opinions concerning his increase in impairment is 9.25 percent (18% + 15% + 4% + 0% ÷ 4). For claimant's left upper extremity, the average of the doctors' opinions concerning his increase in impairment is 9.75 percent (14% + 10% + 15% + 0% ÷ 4).

CONCLUSION

Claimant's Application for Review and Modification was not filed out of time. Claimant is not permanently totally disabled. Claimant has an increase in impairment to his right upper extremity in the amount of 9.25 percent. He has an increase in impairment to his left upper extremity in the amount of 9.75 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Review & Modification of Administrative Law Judge John D. Clark dated March 23, 2010, is modified to find that claimant has an increase in impairment to his right upper extremity in the amount of 9.25 percent and an increase in impairment to his left upper extremity in the amount of 9.75 percent.

RIGHT UPPER EXTREMITY

After subtracting for the 11.86 weeks of temporary total disability claimant was paid in the original award from the 225 weeks in the schedule, claimant is entitled to 19.72 weeks of permanent partial disability compensation at the rate of $432 per week, in the total amount of $8,519.04 for an increase of 9.25 percent loss of use of the right shoulder, which is ordered paid in one lump sum.

LEFT UPPER EXTREMITY

Claimant was not paid any temporary total disability for his left shoulder injury and is entitled to 21.94 weeks of permanent partial disability compensation at the rate of $432 per week, in the total amount of $9,478.08, for an increase of 9.75 percent loss of use of the left shoulder, which is ordered paid in one lump sum.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge